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In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-606

THE STATE OF OKLAHOMA,
Petitioner,

VERSUS

ARCHIE L. MASON, ET AL.,
Respondents.

No. 72-654

UNITED STATES OF AMERICA,
Petitioner,

VERSUS

ARCHIE L. MASON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF PETITIONER, STATE OF OKLAHOMA

OPINION BELOW

The opinion of the United States Court of Claims is reported at 461 F.2d 1364. It is reproduced as Appendix A to the Petition for a Writ of Certiorari filed by the State of Oklahoma in this case (No. 72-606, Pet. App. A-1 to A-29).

JURISDICTION

The judgment of the United States Court of Claims was entered on June 16, 1972. On September 12, 1972, Mr. Justice White granted petitioner's (State of Oklahoma) application for additional time in which to file its Petition for Writ of Certiorari to October 16, 1972. The Petition was filed October 16, 1972, and was granted on January 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1225.

QUESTIONS PRESENTED

1. Did the United States Court of Claims err in attempting to overrule a decision of the United States Supreme Court directly on point?

2. Did the United States Supreme Court decision in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), effectively overrule that Court's decision in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948)?

3. Did the United States breach its fiduciary duty to the Osage Indians, and if so, when did such breach occur?

STATEMENT OF THE CASE

On November 20, 1970, an original action against the United States was brought in the United States Court of Claims by Archie L. Mason and Margaret R. Mason, Administrators of the Estate of Rose Mason, Osage Allottee No. 327, a deceased restricted Osage Indian. The action against the United States was maintained on an alleged breach of fiduciary relationship created by the Osage Allotment Act of 1906, 34 Stat. 539 (often amended).

The Osage Allotment Act, *supra*, divided tribal lands and funds equally among 2,229 tribal members thereby creating "headrights," a term used to describe each of the fractional shares of the distributable income from mineral production together with a reversionary title to a like share of minerals whenever the trust terminates. Under this Act, royalties resulting from the mineral production are placed in the United States Treasury and credited to the individual members of the tribe. Although this trust was initially created for a period of 25 years, the trust period has been extended by statutory amendment to 1983 (52 Stat. 1034, §3). During the period of the trust, legal title to the minerals is in the United States as trustee, but thereafter will vest absolutely in the allottees or their heirs (Section 2(7) and Section 5 of the Osage Allotment Act, *supra*).

The Osage Allotment Act, *supra*, further provides for the issuance by the Secretary of Interior of certificates of competency to adult Osages who were "fully competent and capable of transacting his or her own business and caring for his or her own individual affairs."

Rose Mason was an Osage Indian living in Oklahoma who never received a certificate of competency and the United States held in trust certain of her property. On the death of Rose Mason, the United States through the Osage Agency prepared, signed and filed an Oklahoma estate tax return, including therein as part of the corpus of the estate, property held in trust by the United States. In accordance with the estate tax return, payment of the tax was made in September of 1967 and December of 1968 to the Oklahoma Tax Commission, from the trust fund of Rose Mason held by the United States. The levy of estate tax by the State of Oklahoma and payment thereunder by the United States was based on the United States Supreme Court decision in *West* v. *Oklahoma Tax Commission,* 334 U.S. 717 (1948) (Appendix of Oklahoma's Petition for Certiorari, No. 72-606, Pet. App. B-1 to B-15),[1] which until the present case has been the only expression by this Court of the propriety in levying and collecting such a tax from the Osage.

Archie L. Mason and Margaret R. Mason were appointed co-administrators of the estate of Rose Mason by the County Court of Osage County, Oklahoma, and were subsequently discharged as co-administrators in May of 1968. It is admitted that as administrators, Archie L. Mason and Margaret R. Mason did not participate in the filing of

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[1] The appendix to Oklahoma's Petition for Certiorari contains the United States Court of Claims' decision of *Mason* v. *U. S.,* 461 F.2d 1364 (1972) in Appendix A and the United States Supreme Court decision of *West* v. *Oklahoma Tax Commission,* 334 U.S. 717 (1948), in Appendix B. The Petition for Writ of Certiorari of the United States did not contain an appendix. It was stipulated by counsel for all parties that these decisions would not be reprinted in the single appendix filed with the briefs. Hereafter, reference to either decision will be Pet. App. A or Pet. App. B.

the estate tax return, or the payment of the estate taxes. In November of 1970, the District Court of Osage County allowed the estate of Rose Mason to be reopened, and thereafter reappointed Archie L. Mason and Margaret R. Mason as co-administrators for the specific purpose of instituting a lawsuit to determine if the estate taxes had been erroneously collected and paid by the United States to the State of Oklahoma.

Thereafter this action was maintained in the United States Court of Claims against the United States for a breach of fiduciary relationship in the payment of the Oklahoma estate tax. The State of Oklahoma was impleaded as a third party defendant by the United States, and the United States sought a judgment against the State of Oklahoma in an amount equal to the judgment, if any, which might be obtained against the United States by the administrator.

The case was argued in the United States Court of Claims, and was decided by that Court on June 16, 1972 (Pet. App. A-1 to A-29). In its decision, the United States Court of Claims ruled that *West* v. *Oklahoma Tax Commission,* 334 U.S. 717 (1948) (Pet. App. B-1 to B-15), does not represent the current state of the law, and that the United States breached its fiduciary relationship to the Osage by paying the estate tax levied by the State of Oklahoma and was liable to the Osage for such payment. In turn, the State of Oklahoma was found to be liable to the United States for the full amount of the judgment against the United States. *Mason* v. *U. S.,* 461 F.2d 1364, 1379 (1972) (Pet. App. A-25).

SUMMARY OF ARGUMENT

1. The United States Court of Claims' ruling in *Mason* v. *U. S.*, 461 F.2d 1364 (1972), is directly contra to the United States Supreme Court ruling in *West* v. *Oklahoma Tax Commission,* 334 U.S. 717 (1948). Whether the legal concepts on which *West* was based are still proper is something that only the Supreme Court may decide in light of the *West* decision directly on point. The United States Court of Claims' expression that the United States Supreme Court decision in *Squire* v. *Capoeman,* 351 U.S. 1 (1956), made inroads on the reasoning underlying *West, supra,* is not, even if correct, a sufficient expression by the Supreme Court to warrant overruling the *West* decision or determining that the United States government breached its fiduciary relationship with the Osage Indian. The Court of Claims' reliance upon the subsequent lower court decisions and administrative practices applied to the *Squire* decision as having further eroded the principles of law upon which *West* was based is improper. Lower court decisions and administrative practices may not erode a decision of the United States Supreme Court.

2. *Squire* v. *Capoeman, supra,* is sufficiently distinguishable upon its facts from *West* v. *Oklahoma Tax Commission, supra,* that it cannot be said to have overruled the *West* decision. *Squire* apparently repudiated the doctrine of the ward being taxed for the benefit of the guardian, particularly when the guardian had the direct ability to determine the advent of the tax consequence. Neither of these elements arise from the State levying the estate tax in question. While under a capital gains tax such as that in

Squire, supra, it can always be shown that the restricted Indian may have his property diminshed in value so that "he cannot go forward when declared competent with the necessary chance of economic survival in competition with others" (351 U.S. at 10), this cannot be said of the *Mason* tax. In *Mason, supra,* the tax is levied upon the estate of the deceased restricted Osage Indian, and the monetary benefit therefrom may in actuality pass to a person not sought to be protected by the Allotment Acts or the precepts of *Squire.*

3. The central issue in allowing an Osage recovery is the determination of whether the United States violated its duty as a fiduciary in not attempting to overturn the Supreme Court decision relied upon for the payment of the estate tax to the State of Oklahoma. There is no precedent for imposing the severe standard on a trustee which the Court of Claims suggests in *Mason.* The United States, as fiduciary, was entitled to rely upon the Supreme Court decision in *West, supra.* Even if the subsequent decision by this Court in *Squire, supra,* made inroads on the *West* decision, these inroads were not sufficient to place the burden upon the United States which the Court of Claims has done in *Mason.*

I

With the advent of the *Mason* v. *U. S.,* 461 F.2d 1364 (1972) (Pet. App. A-1 to A-25), decision by the United States Court of Claims, there exists an irreconcilable conflict upon an identical fact situation between that Court in *Mason* and the United States Supreme Court decision in *West* v. *Oklahoma Tax Commission,* 334 U.S. 717 (1948)

(Pet. App. B-1 to B-15). It appears inevitable that this Court should and perhaps must re-evaluate its ruling with respect to the propriety of the State of Oklahoma's levying estate tax on the estates of deceased restricted Osage Indians. However, a ruling by this Court solely on the question of the present validity of *West, supra,* will not resolve all of the questions raised by *Mason, supra,* or those which arise as the result of the class action suit instituted by the Osage on behalf of all "heirs, beneficiaries, and personal representatives of deceased restricted Osage Indians whose estates were reduced by the wrongful payment by the defendant of Oklahoma estate taxes."[2] It would seem proper therefore for this Court to decide all relevant questions raised by the *Mason* decision so as to establish legal guidelines for both this and identical pending litigation.

The Osage contend that this Court should consider only the question of whether *West* v. *Oklahoma Tax Commission, supra, should be* overruled (Brief in Opposition to Petition for Writ of Certiorari, p. 4). It is important to note that the basis for the Osage claim in the original action filed in the United States Court of Claims was based upon a breach of the fiduciary duty by the United States. Paragraphs 7, 8 and 9 of the Osage Petition filed with the United States Court of Claims set forth this alleged breach

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[2] Following the *Mason* decision, a class action was instituted on July 11, 1972, in the United States Court of Claims, styled *Wilson, et al.* v. *U. S.,* Court of Claims No. 285-72. It is estimated that there are over 300 members of that class and the action if successful will make the State of Oklahoma ultimately liable under the Court of Claims' ruling in *Mason, supra,* for all monies collected from whenever that Court determines the United States breached its fiduciary duty.

of duty (App. 6).[3] Oklahoma, as stated previously, agrees that this Court should decide the current acceptability of *West*. This however will not, standing alone, answer fully the contention of the Osage which is the basis of the original lawsuit. There exists a fine difference between "should be overruled" and "has been overruled" which is in fact the difference in the lawsuit. It is Oklahoma's position that this Court could presently find that the *West* decision should be overruled and still find that the United States has not breached its fiduciary duty to the Osage in following *West* to this time. Further, if this Court finds that *West* should indeed be overruled and that the United States did breach its fiduciary relationship to the Osage, the determination when such breach took place does not appear to be answered by *Mason*. Certainly the Court of Claims has ruled in *Mason* that the United States breached its fiduciary relationship in September of 1967. However, a careful examination of the Court's ruling leaves open to speculation precisely when such breach occurred.

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[3] Paragraph 7—Defendant's payment of the Oklahoma estate tax on the trust properties described in paragraph 5 hereof was erroneous and wrongful in its breach of its statutory obligation to turn over the trust properties free from any lien or encumbrance.

Paragraph 8—Defendant's erroneous and wrongful payment of the Oklahoma estate tax, as set forth above, depleted and reduced the value of the trust properties held, managed and controlled by the defendant, in violation of the Osage Allotment Act. Such erroneous and wrongful conduct has damaged plaintiffs in that the estate of the decedent has been depleted or reduced by such wrongful payment and has damaged the beneficiaries of the estate of the decedent in that their respective distributive shares of the decedent's estate have been depleted or reduced by such wrongful payment.

Paragraph 9—Defendant, as trustee and custodian of the funds of the decedent, and funds of the decedent's restricted Osage beneficiaries, owe a duty to pay interest at the prevailing rate on said funds, under

At the present time Oklahoma's assessment of estate tax from the estates of deceased restricted Osage Indians is clearly found to be authorized under *West* v. *Oklahoma Tax Commission, supra.* There is no disagreement by the parties that the factual situation existing in *Mason* v. *U. S., supra,* is identical with that found in *West.* Literally, only the names of the parties have been changed. The Court of Claims recognized the identity of the factual situation and stated:

> "Five years later, this holding was applied to the *very type of trust property now before us*—Osage headrights (and funds derived therefrom) and shares of Osage trust fund (derived from the Kansas lands) held in trust by the United States for the Indians. *West* v. *Oklahoma Tax Commission,* supra, 334 U.S. 717 (1948). . . ." *Mason* v. *U. S.,* 461 F.2d 1364, 1370 (1972). (Pet. App. A-8-9). (Emphasis added.)

That Court recognized not only the identity of the factual situation between *Mason* and *West* but also that the last word from the Supreme Court directly interpreting the question involved in *Mason* is contained in *West* v. *Oklahoma Tax Commission, supra.* The Court of Claims stated in *Mason:*

> "The *West* opinion is the last word from the Supreme Court *directly on point,* but is not the last word on Indian tax immunity." *Mason* v. *U. S.,* 461 F.2d 1364, 1370 (1972). (Pet. App. A-9). (Emphasis added.)

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[3] (Continued)
general fiduciary law, the Osage Statutes, and 25 U.S.C. §162A; and as a result, defendant owes interest on the amount wrongfully removed from the said funds, until restored.

After recognizing the import of the *West* decision to the identical fact situation, the only way in which the Court of Claims could arrive at its decision in *Mason* was to deny the integrity of *West* since it was impossible to distinguish it on the basis of the facts in *Mason*. The Court indicated an understanding of the problems in an inferior court overruling a United States Supreme Court decision, but once recognizing the problem, the Court proceeded to do just that.

> "Appraisal of the applicability of the tax necessarily thrusts us into an inquiry of the current status of *West* v. *Oklahoma,* supra, 334 U.S. 717 (1948). For an inferior tribunal this is a most delicate undertaking. *It goes without saying that we cannot refuse or fail to follow a Supreme Court decision, directly in point, because we disagree with its reasoning or think it erroneous.* But our responsibility differs where there have been significant developments— in the Supreme Court itself, in the lower courts, and in relevant administrative practice—showing that the underpinnings of the highest court decision have been seriously weakened or eroded." *Mason* v. *U. S.*, 461 F.2d 1364, 1374 (1972). (Pet. App. A-17-18). (Emphasis added.)

In its decision of *McCorkle* v. *First Pennsylvania Banking & Trust Company,* 459 F.2d 243 (1972), the Fourth Circuit Court of Appeals addressed itself to a similar problem as indicated by the Court of Claims in *Mason*. In *McCorkle* the Court stated:

> "It would be sheer presumption for an inferior tribunal to undertake to overrule an explicit decision in the Supreme Court from which the court has given no hint of departing, no matter what may be thought of

the wisdom of that decision. It is a function of the Supreme Court to correct our errors; it is not our function to rectify what we may consider mistakes of the Supreme Court." *McCorkle* v. *First Pennsylvania Banking & Trust Company*, 459 F.2d 243, 249 (1972).

In writing the dissenting opinion in *Mason*, Judge Skelton succinctly stated the problem in the majority's reasoning:

> "I think the majority has fallen into error in refusing to follow the decision of the Supreme Court in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717, 68 S.Ct. 1223, 92 L.Ed. 1676 (1948), which it admits involves the identical problem we have in the instant case and is the only decision of that court that has ever decided the exact question we have before us. That case has never been overruled and the law under which it was decided has not been changed. Consequently, we are required to follow it." *Mason* v. *U. S.*, 461 F.2d 1364, 1379 (1972). (Pet. App. A-26).

The Court of Claims in overruling the *West* decision not only relied upon the Supreme Court decision of *Squire* v. *Capoeman*, 351 U.S. 1 (1956), but also upon decisions of the lower courts and relevant administrative practices.

> "But our responsibility differs where there have been significant developments—in the Supreme Court itself, in the lower courts, and in relevant administrative practice—showing that the underpinnings of the highest court's decision have been seriously weakened or eroded." *Mason* v. *U. S.*, 461 F.2d 1364, 1375 (1972). (Pet. App. A-18).

In support of this reasoning the Court cites three decisions[4] which were embraced and expanded by the Osage brief in opposition to certiorari.[5] It appears however that these cases have uniformly resulted from the United States Supreme Court, by its own decisions, changing the concept on which the prior decision was based.

The great weight of authority supports the reasoning of the Court in *McCorkle* v. *First Pennsylvania Banking & Trust Company, supra.* Certainly, under the decisions cited by the United States Court of Claims or the Osage in their brief in opposition to petition for certiorari, relying on decisions of the lower courts and on administrative practices to alter the Supreme Court's decision appears to be a marked departure from the rules of precedent and *stare decisis* which are obviously important to a smooth administration of the law. In that regard, a recent decision from a three-judge panel ruled what petitioner had always felt the law to be.

> "The claim of plaintiffs that the holding in *Mitchell* has been eroded by the subsequent decisions cited by them is untenable. An inferior court can never 'erode' a decision of the United States Supreme Court." *Broadrick* v. *State of Oklahoma ex rel. The Oklahoma State Personnel Board, et al.,* 338 F.Supp. 711, 716 (W.D. Okla. 1972).

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[4] Cases cited by the United States Court of Claims: *Barnette* v. *West Virginia State Board of Ed.,* 47 F.Supp. 251, 252-53 (S.D. W. Va. 1942) (Parker, J.), *aff'd,* 319 U.S. 624 (1943); *United States* v. *Girouard,* 149 F.2d 760, 765-67 (C.A. 1, 1945) (Woodbury J., dissenting), *rev'd,* 328 U.S. 61 (1946); *Andrews* v. *Louisville & Nashville R.R.,* 441 F.2d 1222 (C.A. 5, 1971), *aff'd,* U.S. Sup. Ct., No. 71-300, *decided* May 15, 1972, 40 LW 4511.

[5] Additional cases cited by the Osage in brief in opposition to petition for certiorari, p. 7; *Rowe* v. *Peyton,* 383 F.2d 709, 714 (4th Cir., 1967),

If the reasoning in *Broadrick, supra,* is correct then the Court of Claims is incorrect in relying on the decisions of the lower courts and administrative practices to reach its decision. The specific effect of the Supreme Court decision in *Squire* v. *Capoeman, supra,* as applied to the *West* decision will be discussed in part II.

II

A careful study of *Squire* v. *Capoeman,* 351 U.S. 1 (1956), is necessary to determine what if any actual effect this decision might have had toward eroding or altering in some manner the tenets of the Supreme Court's decision in *West* v. *Oklahoma Tax Commission,* 334 U.S. 717 (1948). This case is particularly significant since it is the only Supreme Court case cited by the United States Court of Claims in *Mason* v. *U. S.,* 461 F.2d 1364 (1972). Mr. Chief Justice Warren, in delivering the opinion of the Court in *Squire,* specified the question considered.

> "The question presented is whether the proceeds of the sale by the United States Government of standing timber on allotted lands on the Quinaielt Indian Reservation may be subject to capital-gains tax, consistently with applicable treaty and statutory provisions and the Government's role as respondents' trustee and guardian." *Squire* v. *Capoeman,* 351 U.S. 1, 2 (1956).

In *Squire, supra,* the respondents were noncompetent Quinaielt Indians, born on the reservation. Pursuant to the

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[5] **(Continued)**
aff'd, 391 U.S. 54 (1968); *Browder* v. *Gail,* 142 F.Supp. 707 (M.D. La. 1956), *aff'd,* 352 U.S. 903 (1956); *Perkins* v. *Endicott Johnson Corp.,* 128 F.2d 208, 217-18 (2d Cir. 1942), *aff'd,* 317 U.S. 501 (1943).

General Allotment Act of 1887 the respondents were allotted 93.25 acres af reservation and received a trust patent. The land in question was described as forest land, covered with trees which were in excess of 100 years old, which would have little value after the timber was cut as it was not adaptable to agricultural purposes.

In 1943, the Department of the Interior contracted for the sale of the timber on respondents' land and a long-term capital-gains tax was levied upon the sum received. In refusing to allow the imposition of such a tax, the Supreme Court quoted with approval an opinion of an Attorney General as follows:

> ". . . In other words, it is not likely to be assumed that Congress intended to tax the ward for the benefit of the guardian. [footnote omitted]." *Squire* v. *Capoeman,* 351 U.S. 1, 8 (1956).

The Court further stated:

> ". . . Respondents' timber constitutes the major value of his allotted land. *The government determines the conditions under which the cutting is made.* Once logged off, the land is of little value. The land no longer serves the purpose for which it was by treaty set aside to his ancestors, and for which it was allotted to him. *It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence.*" *Squire* v. *Capoeman,* 351 U.S. 1, 10 (1956). (Emphasis added.)

After the careful examination of *Squire* recently by the Court of Claims, blessed with these 16 years of changing philosophy with regard to the past treatment of the Indian, the Court indicates that *Squire* made inroads with

regard to the philosophical and legal theories upon which *West* was based. As indicated in part I, Oklahoma does not necessarily disagree with all the concepts of the Court of Claims as set forth in *Mason*. While Oklahoma does not believe that *West* has been overruled by *Squire*, it understands that we are to a stage of thinking in which *West* might be best overruled. However, *West* appears to be the law and should be considered as such without a clear expression from this Court to the contrary. Certainly, there were numerous factual distinctions between *West* and *Squire* which make any statement that *Squire* did in effect overrule *West* opaque at best.

Squire v. *Capoeman, supra,* differs markedly on its facts from *West* and is therefore distinguishable from the *West* decision. As Judge Skelton pointed out in his dissenting opinion in *Mason:*

> "In that case *(Squire)*, the court was dealing with a *direct tax* on the property of a *living noncompetent* Indian and no inheritance tax imposed by a state was involved. Furthermore, the tax would be imposed on the property of the wards by their guardian during their lifetime. No such facts exist in *West* nor do they exist in our case." *Mason* v. *U. S.*, 461 F.2d 1364, 1380 (1972). (Pet. App. A-28). (Emphasis added.)

It is evident from reading the *Squire* decision, that the Supreme Court had difficulty in accepting the situation in which the ward was taxed for the benefit of the guardian (351 U.S. at 8). Certainly, this is not the case when Oklahoma is attempting to collect a tax on the estate of a deceased Indian. Also, *Squire* seems distinguishable on its facts in that the incident which gives rise to taxation under

Squire was directly under the control and management of the taxing agency (351 U.S. at 10). In the case of the State's taxation on the estate of the deceased Indian, the State exercises no control over the advent of the tax consequence and cannot be said to have the implied power to pick a time advantageous to the State to levy such a tax.

Finally it appears that the Court in *Squire* was concerned by a diminution in value of that which had been allotted the restricted Indian so that "he cannot go forward when declared competent with the necessary chance of economic survival in competition with others" (351 U.S. at 10, cited with approval by the Court in *Mason*). (See Pet. App. A-19.) In the present case as in *West* an estate tax was levied by the State after the noncompetent Indian was deceased. This does not defeat the principle set out by the Supreme Court in *Squire* of attempting to preserve for that noncompetent Indian as much of his allotment as possible. Certainly in *Squire,* the tax was levied on property which would be directly diminished in value as to the noncompetent Indian for whom the property was held in trust. Assuming, *arguendo,* the heirs of the Osage may themselves be Indians who have received their certificate of competency, there is nothing in *Squire* to indicate that there is either a legal or philosophical reason to protect this class of Indian.

In any event it seems clear that the facts in *Squire* are sufficiently distinguishable from those in *West* that a reading of both cases, without anything further, indicate that *West* still governs the factual situation in *Mason.* Moreover, the distinguishing facts are such that even if the in-

roads which the Court of Claims discussed were made as to the legal concepts of *West*, that should not be considered sufficient to charge a fiduciary with a breach of trust in adhering to the *West* decision.

III

Oklahoma contends that the central issue in an Osage recovery is whether the United States violated its duty as a fiduciary in not seeking to overturn the Supreme Court's decision in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948). The United States indicates this is a primary question in its Petition for Writ of Certiorari (see United States' Petition for Writ of Certiorari, page 2), and Oklahoma will not make an attempt to exhaustively discuss the law regarding the responsibilities of a governmental trustee. This petitioner, like the United States, has been unable to find any precedent for imposing the strict standard on a trustee to which the Court of Claims alludes in the *Mason* decision. A review of the decisions cited by the Court of Claims in *Mason* v. *U. S.*, 461 F.2d 1364, 1372 (1972) (Pet. App. A-14-15) does not reveal an instance in which a fiduciary was charged with an obligation to bring a lawsuit to question the validity of an existing United States Supreme Court decision. The Court also discusses Bogert, Trust and Trustees (2nd Ed. 1959) §602 (at 386), and appears to rely upon the language in that treatise which states:

> "The trustee has a duty to resist the levy and collection of unjust and improper taxes against the trust estate."

The case cited under that statement has no bearing or current application, and it is difficult to imagine that a tax which may be argued to be specifically authorized by a United States Supreme Court decision could be held to be unjust or improper.

As suggested in Part I, it is difficult at best to determine at what point in time the Court of Claims determined the United States breached its trust. The Court of Claims apparently feels that the United States should have brought an action to test *West*, but does not specify when such an action should have been brought. It is clear in its holding in *Mason* that by 1967 or 1968 the Court of Claims felt that the United States had breached its fiduciary relationship with the Osage by not bringing an action to test *West*. The Court stated:

> ". . . For we are satisfied that, by 1967 and 1968 when the tax was handed over, the shadows on that decision *(West)* loom so large that the Government, as fiduciary with the obligation to protect the Indian, should have tested the current acceptability of *West* by challenging collection of the tax. . . ." *Mason* v. *U. S.*, 461 F.2d 1364, 1372 (1972). (Pet. App. A-13).

The shadow to which the Court refers consists of *Squire* v. *Capoeman*, 351 U.S. 1 (1956), two cases decided by the Court of Claims, *Big Eagle* v. *United States*, 300 F.2d 765 (1962), *Beartrack* v. *United States*, Ct. Cl. No. 281-67 (1967) (a case settled by the United States on October 25, 1968), and an internal revenue ruling handed down after the payment of this tax in question on April 7, 1969, in Rev. Rul. 69-164. After recitation of these cases, the Court of Claims stated:

> "From all this, the Department of Interior would have to conclude, in our view, that there was at the very least a serious question whether *West* remains viable and that, as a fiduciary for Rose Mason and her estate, the United States would have to test that issue by protesting the payment of the tax and litigating its applicability. (By footnote, the Court pointed out that the federal government brought a suit to recover the inheritance taxes imposed by Oklahoma in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598.)" *Mason* v. *U. S.*, 461 F.2d 1364, 1372 (1972). (Pet. App. A-14).

It would appear that if the Court of Claims is correct in its analysis of the trustees' obligation, then in effect the trustee has a continuing obligation to be constantly testing by litigation any court decision that might possibly affect a decision upon which the trustee relies. A trustee could have no feeling of security in reliance upon any case decisions, even those of the United States Supreme Court.

Once deciding that the United States did in fact breach its fiduciary relationship with the Osage Indian by not refusing to pay to the State of Oklahoma the estate tax or otherwise testing the *West* decision, the Court holds the State of Oklahoma liable to the United States.

> "If, as we have just held, the Oklahoma estate tax should not have been paid or collected with respect to this Indian trust and restricted property, the State is liable over to the United States, which, as trustee, improperly paid the tax. As trustee, the United States can sue for return of the money." *Mason* v. *U. S.*, 461 F.2d 1364, 1379 (1972). (Pet. App. A-25).

If the Court of Claims is correct in its holding, then a serious detriment to the State of Oklahoma has occurred.

The impact of the *Mason* decision though of minor monetary consequence initially will by its application to the case of *Wilson* v. *U. S., supra* (the class action on behalf of all the remaining restricted Osage Indians) create a monetary consequence which will be significant to the State. Although the ultimate exposure in this matter was not determined by the Court of Claims in *Mason,* it is possible that the State of Oklahoma might have to repay all taxes collected from restricted Osage Indians back to 1956, which will unquestionably be several million dollars. Practically, it is difficult for a State, once money has been collected and placed into the general fund, to make restitution of such a sum of money out of one year's budget. Additionally, any attempt to recover interest on the tax payment by the Osage from the United States which is passed along to the State of Oklahoma in effect would penalize the State as the result of acts over which she had no control. (The Osage has sought these interest payments in *Wilson, supra.*) This Court has spoken to this problem in a case of substantially the same import wherein it stated:

> ". . . Whatever may be her (Jackson County, Kansas) unfortunate duty to restore the taxes which she had every practical justification for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she could not have known was not properly hers." *Board of County Commissioners of the County of Jackson, et al.* v. *United States of America, et al.,* 308 U.S. 343 (1939).

While the Osage contend that a discussion of the matters just presented are premature, it would seem proper for this Court to determine not only if the United States

did breach its fiduciary duty, but to also determine the extent of the State of Oklahoma's possible exposure by specifying the time in which the breach occurred and whether or not the State of Oklahoma might be liable for the interest payment.

CONCLUSION

Irrespective of the Court's determination as to the present acceptability of *West* v. *Oklahoma Tax Commission, supra,* the United States did not breach its fiduciary relationship with the Osage Indian. No breach in fact occurred and the United States is not liable to the Osage Indian, nor is the State of Oklahoma liable to the United States. The State of Oklahoma asks that this Court reverse the ruling of the United States Court of Claims in *Mason* insofar as that Court found any breach of duty to have occurred, and thereby set aside that Court's judgment allowing recovery by the Osage against the United States and a recovery over by the United States against the State of Oklahoma.

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CERTIFICATE OF SERVICE

I hereby certify that on this ..... day of February, 1973, three copies of the Brief of Appellee were mailed, with postage prepaid thereon, to all parties required to be served as follows:

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